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IN THE

Supreme Court of the United States

OCTOBER TERM, 196

NO.

UNITED STATES OF AMERICA, *Appellant*

v.

NATIONAL DAIRY PRODUCTS CORPORATION

and

RAYMOND J. WISE, an individual, *Appellees*

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLEES

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ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
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BRIEF FOR APPELLEES

QUESTION PRESENTED

The question presented by this appeal is whether the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act is unconstitutionally vague. The clause in issue states:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." (49 Stat. 1526, 15 U.S.C. sec. 13a)

The texts of Sections 1 (section 2 of the Clayton Act), and 3 of the Robinson-Patman Act are reprinted in the Appendix to this brief.

STATEMENT

Seven counts of the fifteen-count indictment charge that the corporate defendant, National Dairy Products Corporation, sold milk "at unreasonably low prices for the purpose of destroying competition . . . in violation of Section 3." (Counts Two, Four, Six, Eight, Ten, Thirteen, and Fifteen, R 9, 12, 15, 18-19, 22, 28 and 32)[1] One of these counts (Thirteen) also makes the same charge against the individual defendant, Raymond J. Wise. Each count also contains an additional paragraph alleging that sales were made to distributors "at prices below National's cost."

The defendants moved to dismiss these counts on the ground that they rest upon a statutory provision which is so vague as to be contrary to the due process requirements of the Fifth Amendment and to the requirement of the Sixth Amendment that defendants in criminal cases be adequately informed of the accusations against them. (R 52, 68, 71) In an oral opinion the court held that the Robinson-Patman Act counts were based upon a statutory provision which is unconstitutionally "vague and indefinite." (R 121-22) An order of dismissal was entered, finding the clause of Section 3 "so vague, indefinite and uncertain as to violate the Fifth and Sixth Amendments to the Constitution of the United States." (R 122-23)

The decision was not an off-hand ruling (R 87, 90, 121), as the Government seems to imply. (G.B.5) Briefs were

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1. In this brief, the abbreviation, "R", refers to the printed Transcript of Record herein, and the abbreviation, "G.B.", refers to the Government brief on appeal.

filed by both the defendants and the Government, and there was extensive oral argument. (R 86-121).

During the oral argument, the trial judge asked whether the charges of the indictment were limited to charges of sales below cost, and was told by Government counsel that they were not. (R 114-16). In view of the language of the indictment and of the interpretation placed upon it by Government counsel, the court, in dismissing the indictment, construed the charges as being as broad as the language of the statute.

In its Notice of Appeal the Government broadly described the indictment as charging "sales at 'unreasonably low prices'" and stated that the question presented by the appeal is whether prohibition "of unreasonably low prices for the purpose of destroying competition or eliminating a competitor" is unconstitutionally vague. (R 124-25). In its brief, however, the Government has virtually abandoned any attempt to support the language of the statute. Instead it has sought to limit the question to whether the statutory clause "as applied to sales made below cost with such purpose" is unconstitutionally vague and indefinite. (G.B. 3). It urges that the Court may not consider whether the language of the statute itself deprives appellees of constitutional rights but must instead consider whether its application to the facts alleged in the indictment, which the Government here for the first time construes as limited to "sales below cost," would be constitutional. (G.B. 32).

SUMMARY OF ARGUMENT

I. The issue before the Court is whether the language of the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act, on which the indictment is based, is so vague as to be unconstitutional. (A.) The indictment in this case is drawn in the statutory language and brings the full scope of that language into issue. It is not limited to charging sales below cost. (B.) Irrespective of the language of the indictment, under the decisions of this Court the constitutionality of the statute can and should be tested on the basis of the language of the statute.

II. Judged by the principles evolved by the Court for testing the constitutionality of criminal statutes in vagueness cases, the "unreasonably low prices" clause of Section 3 is fatally vague, indefinite and uncertain. (A.) The statute is inherently vague. (B.) Decisions of this Court demonstrate that the "unreasonably low prices" clause is unconstitutionally vague. (C.) The intent requirement of the provision in issue does not reduce the uncertainty of the "unreasonably low prices" clause and does not render the provision constitutional. (D.) The inherent vagueness of the clause is greatly increased by its inconsistency with the general scheme of the Robinson-Patman Act, and by its incongruity with the antitrust policy of price competition. (E.) For these reasons, the "unreasonably low prices" clause has long been recognized to be of dubious constitutional validity by the Department of Justice and by most writers.

III. There is no basis for construing the prohibition against sales at "unreasonably low prices for the purpose of destroying competition" as equivalent to "sales below

cost with predatory intent." No process of construction warrants the approach offered by the Government, and this interpretation is itself vague and indefinite. (A.) Contrary to the Government's argument, selling below cost is not in itself unreasonable conduct. Only rarely is it contrary to business and community standards. Accordingly, selling below cost, even if done with intent to eliminate competition, would not be legally equivalent to the statutory prohibition. (B.) Moreover, the Government's attempted construction of the statute to mean "selling below cost" would not provide a sufficiently clear standard. The concept of "cost", without benefit of statutory definition or meaning derived from legislative history, is itself vague and indefinite.

I. THE ISSUE BEFORE THE COURT IS THE CONSTITUTIONALITY OF THE PROHIBITION OF "UNREASONABLY LOW PRICES," AND NOT OF SALES BELOW COST.

The district court held that the statute, on which the indictment before it was based, is so vague and indefinite as to violate the due process and notice requirements of the Fifth and Sixth Amendments and is therefore unconstitutional on its face. On the basis of that holding the Government has invoked the jurisdiction of this Court under the Criminal Appeals Act to review directly a district court judgment "dismissing . . . any indictment . . . where such . . . judgment is based *upon the invalidity . . . of the statute* upon which the indictment is founded. . . ." (34 Stat. 1246, 18 U.S.C. § 3731; emphasis added)

Despite the fact that in its brief and argument below the Government defended the "unreasonably low prices" language of the statute itself and recognized the scope of the charges of the indictment as being co-extensive with that language, the Government now offers virtually no support for that language, but seeks instead to defend a purely hypothetical prohibition against selling below cost. While it suggests in a footnote that it might be possible in some circumstances to show that a price is "unreasonably low" even though it is higher than the seller's costs (G.B. 20, n. 7), it makes no argument on behalf of this proposition.

The Government expressly admits the serious ambiguities inhering in the language used by Congress in the statute. (G.B. 12) It contends, however, that the Court should concern itself only with the prosecution's choice of terminology in the indictment and should not be drawn into a consideration of the words of the statute. In view of the scope of the indictment itself, however, the vagueness issue presented on this appeal cannot be disposed of in the unique manner attempted by the Government. Moreover, irrespective of the language of the indictment, under the decisions of this Court, the constitutional question concerns the language of the statute, not the indictment.

A. The "Unreasonably Low Prices" Allegations of the Indictment Are Not Limited to Sales Below Cost.

The allegations of the indictment are as broad in scope as the statutory provision and plainly are not limited to charging below-cost sales.

Each count of the indictment relating to Section 3 contains two paragraphs under the heading, "Offense Charged Robinson-Patman Act." Counts Two, R 9; Four, R 12; Six, R 15; Eight, R 18; Ten, R 22; Twelve, R 25; and Fifteen, R 32. The first such paragraph alleges that defendant "sold milk to its distributor . . . at unreasonably low prices for the purpose of destroying competition . . . in violation of Section 3" of the Robinson-Patman Act. The second paragraph then adds that "pursuant to and in effectuation of the offense charged" in the preceding paragraph the defendant utilized advantages of operating in many geographical localities to finance a price war against small dairies competing with it and its distributor "by intentionally selling milk to its distributor . . . at prices below National's cost."

As the second paragraph states, the "offense charged" is that alleged in the first paragraph, where the allegations are not in terms of sales below cost, but are in the language of the statute, "unreasonably low prices." The Government admits that the words, "unreasonably low prices," when appearing in the statute, may mean both sales above and sales below cost. G.B. 20, n. There is no basis for reading this language any differently when it appears in the charging paragraph of the indictment.

If the indictment were intended, when it was drawn, to be limited as the Government now argues, it would have alleged simply in one paragraph that defendant had sold milk at prices below cost in violation of the "unreasonably low prices" prohibition. This is the method followed in the Sherman Act counts of the indictment where the type of

restraint charged is alleged as part of the overall allegation of violation, *viz.*, "a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk . . . in unreasonable restraint of trade." (*e.g.*, Count One, R 7)

The Sherman Act counts provide further internal evidence that the Robinson-Patman Act counts are not limited to sales below cost. Several of the Sherman Act counts allege that defendant agreed to "sell milk in paper carton containers . . . below its cost *or at special discount prices.*" (*e.g.*, R 10-11; emphasis supplied.) Since the Government states that each Robinson-Patman count parallels a Sherman Act count (G.B. 5, n. 1), these sales are evidently among those charged to have been at unreasonably low prices. But sales "at special discount prices" are obviously not necessarily sales at prices below cost.

Moreover, representations made by Government counsel to the trial court established that the indictment has a broader scope than below-cost sales. In the course of the oral argument counsel undertook to summarize how the Government would attempt to show the unreasonableness of defendant's prices. (R 114) The court then asked whether the case against defendants was limited to sales below cost. Government counsel expressly stated that it was not so limited:

> "The Court: Well, do you understand that it is a requirement that to be an unreasonably low price that it must be below cost?
>
> "Mr. Eisen: No, it does not have to be below cost." (R 115)

Neither the Government brief below, nor the written statements on behalf of defendants (R 33, 71), interpreted

the indictment as limited to sales below cost. The trial court expressly relied on the briefs in its oral opinion holding the "unreasonably low prices" clause unconstitutional. (R 121-22) The trial court's oral opinion and its order of dismissal both construed the indictment as a general allegation of unreasonably low prices. (R. 124-23) The Government in its Notice of Appeal described the indictment as "charging defendants with charging unreasonably low prices . . ." and did not even mention sales below cost. (R 124-25) The Notice stated without any qualification that the question presented by this appeal is whether the "unreasonably low prices" clause of the Act is constitutional. (R 124-25).

The Government cannot now attempt a different construction of the indictment. This court has often held that the trial court's construction of the indictment is controlling in appeals under the Criminal Appeals Act. *United States v. Winslow*, 227 U.S. 202, 216-217 (1913); *United States v. Borden Co.*, 308 U.S. 188, 193 (1939); *United States v. Jones*, 345 U.S. 377, 378 (1953). It is, of course, also beyond dispute that the Government cannot, on its own motion, amend the scope of the indictment as it was presented by the grand jury. *Ex Parte Bain*, 121 U.S. 1, 6, 9 (1887).

B. The Language of the Statute, Not of the Indictment, Must Be Tested.

Even if the indictment were limited to allegations of sales below cost, the issue would nevertheless be the validity of the "unreasonably low prices" clause. The Government cannot defeat vindication of the constitutional rights of due

process and notice by the expedient of submitting its own indictment, rather than the statute, to the test. It is well-established by the decisions of this Court that the validity of a statute challenged as unconstitutionally vague "must be tested on the basis of the terms employed" in the statute. *Champlin Refining Co. v. Corporation Commission of Oklahoma,* 286 U.S. 210, 242 (1932). In the often-quoted language of *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939) the test is of the statute "on its face" because "it is the statute, *not the accusation under it,* that prescribes the rule to govern conduct and warns against transgression . . . ." (Emphasis added.)

This settled procedure is required by the substantive nature of the applicable constitutional doctrine. Criminal statutes must describe what they prohibit with sufficient clarity to give notice and fair warning, so that those affected will be able to comply with the law. The doctrine was most recently reaffirmed by the Court in *Cramp v. Board of Public Instruction of Orange County, Florida,* 82 S. Ct. 275 (decided December 11, 1961), where the Court again endorsed the classic statement contained in *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926):

> "That the terms of the penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. The statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily

> guess at its meaning and differ as to its application violates the first essential of due process of law."

Obviously, only "the terms of the penal statute," as they stand or as authoritatively construed, can reveal whether the statute is "sufficiently explicit" to meet these minimal constitutional requirements.

On this issue the present case is indistinguishable from *United States v. Petrillo*, 332 U.S. 1 (1947). The information in *Petrillo* was drawn in much the same form as the indictment here, *i.e.*, it was drawn in the statutory language "up to the place where it specifically charges the particular means used. . . ." (332 U.S. at 5)[2] There, as here, a motion to dismiss was granted by the district court because the statute was unconstitutionally vague on its face. Under these circumstances, this Court held that the question "squarely" raised by the motion was "whether the section invoked in the indictment is void *in toto*, barring all further actions under it, in this, and every other case." (*Id.* at 5-6)

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2. The Government attempts to distinguish the relevant part of the *Petrillo* opinion, as well as the holding in *Thornhill v. Alabama*, 310 U.S. 88 (1940), on the basis that in those cases the Court "had nothing more to go on" than the language of the statute. (G.B. 34) But this reading of those cases is erroneous, and both cases stand squarely against the Government's attempt in this case to divert the issue from the statutory language. The *Petrillo* indictment alleged "the particular means used" (332 U.S. at 5), and in *Thornhill* there was no doubt at all as . now the statute was to be applied since the case came to this Court only after conviction. Nevertheless, this Court tested the statute "on its face." (310 U.S. at 97)

The Court stated further that "whether the contested section is written so vaguely and indefinitely that one whose conduct is affected could only guess what it meant" was a question then "ripe" for decision. (332 U.S. at 6)[3]

Indeed, so far as we have been able to determine, in every case brought, as is the instant case, on direct appeal under the Criminal Appeals Act after a district court had held an act of Congress unconstitutional for vagueness, this Court has looked to the face of the statute to determine the constitutional issue: *United States v. Harriss,* 347 U.S. 612 (1954); *United States v. Five Gambling Devices,* 346 U.S. 441, 453-454, 456-459 (1953); *United States v. Kahriger,* 345 U.S. 22, 33-34 (1953); *United States v. Spector,* 343 U.S. 169 (1952); *United States v. Petrillo,* 332 U.S. 1 (1947); *United States v. Shreveport Grain and Elevator Company,* 287 U.S. 77 (1932); *United States v. Wurzbach,* 280 U.S. 396 (1930); *United States v. Alford,* 274 U.S. 264 (1927); *United States v. L. Cohen Grocery Company,* 255 U.S. 81 (1921); cf. *United States v. Evans,* 333

3. *Petrillo* followed closely in time the leading decision in *Rescue Army v. Municipal Court of Los Angeles,* 331 U.S. 549 (1947) detailing this Court's "policy of strict necessity in disposing of constitutional issues." (331 U.S. at 568) With respect to the application of that policy in vagueness cases, *Rescue Army* recognized as "well settled" the ruling of *Bandini Petroleum Co. v. Superior Court,* 284 U.S. 8 (1931). In that case a California statute was challenged as unconstitutionally vague, and on the basis of the statutory language alone "this Court . . . determined the constitutional issues presented on the face of the statute . . ." (331 U.S. at 566) *Petrillo* squarely held that the rule acknowledged by *dictum* in *Rescue Army* remained the settled law.

U.S. 483, 495 (1948); *United States v. Classic*, 313 U.S. 299, 309 (1941).[4] The application of the same rule with respect to a state statute is most recently illustrated by the Court's unanimous decision in *Cramp v. Board of Public Instruction of Orange County, Florida*, 82 S. Ct. 275 (1961).

In the *Spector* case, the Court explicitly rejected the argument made by the Government here that the issue was whether the statute was constitutional as applied in the case before the Court, stating:

> "While a statute, plain and unambiguous on its face, may be given an application that violates due process of law, we are not concerned with that problem in the present case. The question here is whether the statute *on its face* meets the constitutional test of certainty and definiteness." (343 U.S. at 171, emphasis added)

And in *United States v. Harriss*, 347 U.S. 612 (1954), another case involving the quashing of an indictment brought under a federal statute and a case on which the Government surprisingly seems to rely (G.B. 33), the Court, though divided on the merits, was unanimous in rejecting the Government's claim that the question was merely whether the statute's application to the particular situation described in the indictment was unconstitutional.

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4. In *United States v. Wurzbach*, 280 U.S. 396 (1930) the details of the indictment were given substantial discussion, but it is clear that this consideration came only after the Court had determined that the statute challenged was valid on its face, "perfectly intelligible." (*Id.* at 398)

Mr. Chief Justice Warren, speaking for the Court, made it clear that "we judge the statute on its face." (347 U.S. 612, 617) Mr. Justice Douglas, speaking for a dissenting minority, agreed that "the question . . . is not what the information charges nor what the proof might be. It is whether the statute itself is sufficiently narrow and precise as to give fair warning." (*Id.* at 629) Another dissenting opinion by Mr. Justice Jackson deemed the statute on its face "mischievously vague." (*Id.* at 633)

The theory offered by the Government here is not only at variance with these decided cases but constitutes a denial of the rationale of the vagueness doctrine itself and of the jurisdiction of this Court under the Criminal Appeals Act to review judgments based upon the invalidity of a statute. The Government is really saying that the prosecutor can always cure a vague statute by making the indictment definite. But the Constitution requires fair warning through the statute itself so that illegal conduct may be avoided. The indictment, which issues only after the accused has done what the indictment claims to have been prohibited, cannot give that notice. Moreover, the Government's theory would turn every challenge to a statute for vagueness into a dispute over the terms of the indictment and deprive this Court of the very jurisdiction that the Government has invoked in this case.

No case cited by the Government (G.B. 29, 33, 35) holds that the prosecution can avoid a test of statutory language on vagueness grounds by offering the language of the indictment instead. In *United States v. Ragen*, 314 U.S. 513 (1942) the only challenge made was as to the

application of the statute in the particular case; the Court pointed out that the statute "standing alone, is not vague . . . ." (314 U.S. at 523). *Robinson v. United States*, 324 U.S. 282 (1945) involved primarily a problem of statutory construction. The majority clearly thought the constitutional argument was frivolous since the language at issue was everyday English delineating a general class of proscribed activity, into which the deeds of the defendant, who had already been tried, convicted and sentenced in the court below, indisputably fell. In *United States v. Fruehauf*, 365 U.S. 146, 157 (1961), as the Court's opinion shows, there was no vagueness issue and no attack was made on the statute itself. Again, *United States v. Raines*, 362 U.S. 17 (1960) involved no problem of constitutional indefiniteness, but the Court recognized that a challenge to a statute for vagueness presents a situation in which the statute must be judged on its face. (*Id.* at 22, 24).

The remaining cases cited by the Government (G.B. 33) involved situations in which it had not been shown that those who brought the actions, which were for injunction or declaratory judgment, would be injured by enforcement of the challenged statutes. Accordingly, they turned on the question of the existence of a case or controversy. The natural reluctance of this Court to entertain actions brought to vindicate the rights of third parties (*Barrows v. Jackson*, 346 U.S. 249, 255 (1953)) or to rule on the constitutionality of a state statute before the state courts had been given an opportunity to construe it (*Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 459, 462, 470-471 (1945)) or to comment on the "political expediency" of

an Act of Congress (*United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947)) has little to do with the case at bar.

Here appellees do not face what the Court called in the *United Public Workers* case a "hypothetical threat." (*Id.* at 90) Both have been indicted in the words of a Federal statute. Both risk criminal conviction. The Court's comment in *Cline v. Frink Dairy Co.*, 274 U.S. 445, 457 (1927) is particularly apt: "the whole statute [is] without a fixed standard of guilt in an adjudication affecting the liberty of the one accused."

Under these circumstances it is the settled rule of this Court that the issue is whether the statutory provision under which respondents have been indicted is so vague and indefinite on its face as to deprive them of their constitutionally guaranteed rights of notice and due process. The Government should not be permitted to thwart those basic civil rights by diverting the Court's attention to the Government's own choice of words in the indictment, when the relevant issue is the constitutionality of the statute on which the indictment is based.

II. THE "UNREASONABLY LOW PRICES" CLAUSE OF SECTION 3 OF THE ROBINSON-PATMAN ACT IS UNCONSTITUTIONALLY VAGUE.

The "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act in issue states that it is unlawful "to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." (49 Stat. 1526, 15 U.S.C. sec. 13a) The statute

contains no definitions of these indefinite terms. Yet it makes violation a crime and provides for penalties of up to $5,000 fine and a year's imprisonment. (See Appendix to this brief.) This prohibition is unconstitutionally vague, as the district court held.

A. The "Unreasonably Low Prices" Clause Is Inherently Vague and Has Acquired No Clear Meaning from Legislative History or from Decisions.

The unreasonably low prices clause is intrinsically vague. It prohibits no specific act, and it provides no intelligible standard of conduct by which businessmen can guide their sales in competition with others and be assured of staying within the law. It is equally vague as a standard for the conduct of trials. Without any definitions, it subjects corporate violators to the threat of criminal conviction and fines; and it subjects individual entrepreneurs and partners in small and large businesses alike to the threat of jail sentences as the cost of failure to comprehend and follow its inscrutable standards.

The phrase "unreasonably low prices" is the touchstone for applicability of the prohibition. This phrase requires a judgment by businessmen, and by courts and juries, as to whether a given price is illegally low as a matter of dollars and cents. But how can one know, or by what process can one decide, whether the amount of a price is "unreasonably" low? Ever since economic society abandoned the Middle Ages concept of a "just" price,[5] morality

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5. See Havighurst, The Nature of Private Contract 101 (Northwestern Univ. Press, 1961).

has not provided a legal standard for the measurement of prices. Our courts do not judge in legal actions whether prices are too high or too low—an inquiry which is occasionally delegated for regulated industries to administrative agencies, but which generally is left to the free decisions of entrepreneurs under the limitations imposed by competition in the marketplace.

Indeed, it is the complete freedom of prices to move according to the pressures of economic forces that makes it possible for the competitive market price system to function, in the language of Mr. Justice Douglas, as the "central nervous system of the economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, n. 59 (1940). Accordingly, as is shown in succeeding sections of this brief, the attempt to induce the courts to administer and adjudicate prices by reasonableness tests has been repeatedly and consistently rejected.

It will also be shown that the phrase "unreasonably low prices" is not made constitutionally definite by the additional requirement that the prices be charged with the intent to destroy competition or eliminate a competitor. There is a temptation, manifested in the Government brief, to seek to solve the inherent indefiniteness of the unreasonably low prices clause by using the intent requirement as a test of unreasonableness. To do this, however, would read "unreasonably low" out of the Act, and tend to make any price unreasonable if charged by one entertaining the requisite purpose. The Act would then endanger all who, while making sales, entertain the desire to defeat

their competitors. Such an invalidation of price competition cannot have been the intent of Congress.

The history of the clause does not illuminate its meaning. As the Government states (G.B. 15, n. 4), the language of Section 3, enacted in 1936, was copied from a statute passed by the Canadian Parliament in 1935, only a year earlier. Consequently, unlike other provisions of our antitrust legislation, the language of the "unreasonably low prices" clause was not drawn from the common law, nor was it based upon any prior antitrust experience of the United States. The Canadian act had received no court interpretation in Canada at the time our act was passed, and insofar as we and the Government have been able to determine, there is to this day no reported Canadian court case construing its meaning. (G.B. 15, n. 4)

Moreover, as the Government brief shows, little attention was paid to the clause in the Congressional discussions of 1935 and 1936. The section, which was originally known as the "Borah-Van Nuys Bill," was introduced in the Senate as a substitute for the Robinson-Patman price discrimination bill.[6] Inadvertently interjected in this way into a controversy which was almost exclusively concerned with how to deal with problems of price discrimination, the Canadian-originated, "unreasonably low prices" clause received little discussion. Its sponsors gave it no exposition, and it was not

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[6] S. 4171, 74th Cong., 2d Sess. See PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION 221 (Harv. Univ. Press, 1955, Harvard Political Studies, published under the direction of the Department of Government in Harvard University).

explained in any committee report. The House held no hearings on it, and the Senate hearings on the Borah-Van Nuys bill centered largely on the price discrimination provisions both of that bill and of the Robinson-Patman bill with more attention being paid to the latter.[7] The hearings contain only a very few scattered and uninformative references to the "unreasonably low prices" clause. (G.B. 16)

When the various forces in the House and Senate were unable to compose their differences, Congress ended a stalemate by enacting both bills.[8] It is well known that passage of both bills was not the original desire of the sponsors of either and was an unfortunate and confusing occurrence which has always made it difficult to discern the meaning of any part of Section 3 by reference to legislative history.[9] Certainly that history sheds no light on the "unreasonably low prices" clause and reveals no clear purpose for its passage. As shown later in this brief, the Government's attempt to show that the clause was specifically aimed at predatory below-cost sales is decidedly without support.

That the constitutionality of the "unreasonably low prices" clause has yet to be tested by this Court is the result of almost complete nonuse of this clause by the Department of Justice. No decisions have given meaning to its vague language. Until 1958, over 20 years after the passage of the Act, the Government obtained no indictments

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7. *Hearings Before a Subcommittee of the Senate Committee on the Judiciary on* S. 4171, *Price Discrimination*, 74th Cong. 2nd Sess. (1936); see PALAMOUNTAIN, *op. cit. supra* note 6.

8. PALAMOUNTAIN, *op. cit. supra* note 6, 225, 228.

9. *Ibid.*

under it. We know of only two cases in which such charges have ever been made—the present case and *United States v. Fairmont Foods Co.* (unreported), which involved charges under the second and third clauses of Section 3 as well as under the Sherman Act and was terminated without a trial.[10]

Very few private actions were brought against competitors for allegedly charging prices which were too low, and in *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958) the Court held that private litigation under Section 3 is not authorized. The Court based its conclusion in part upon the belief that Congress did not intend to place defendants at the risk of suit by their competitors under the "unreasonably low prices" clause, which the Court called "this vague provision." (Id. at 378)

The Government itself, claiming that it need not defend the words of this dubious clause, offers no exposition of its meaning. Instead it concedes its ambiguity and susceptibility to inconsistent interpretations. It admits the "conceptual problems" of the language, and it demonstrates that the clause may restrain lawful activity by showing how it may be given different meanings. (G.B. 12) With this

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10. The defendant pleaded guilty in the *Fairmont Foods* case, and sentence was imposed only under the Sherman Act count. TRADE REG. REP. U.S. ANTITRUST CASES SUMMARIES, Case No. 1422, 66,368 (1957-61).

The Government has inadvertently erred in stating that *United States v. Safeway Stores, Inc.*, 20 F.R.D. 451 (N.D. Tex. 1957) also involved charges under the unreasonably low prices clause. (G. B. 23) The Robinson-Patman Act counts in that case rested entirely upon the second clause of Section 3.

demonstration respondents are in accord. We respectfully disagree, however, when the Government states that the Court "need not concern itself" with what the Government calls "those analytical questions." (*Ibid.*) Those questions are at the root of the constitutional invalidity of this prohibition.

B. The Decisions of This Court Demonstrate That a Prohibition of "Unreasonably Low Prices" Is Not Sufficiently Definite To Satisfy Constitutional Requirements.

1. A Long Line of Constitutional Decisions Has Established the Invalidity of a Reasonableness Test for Prices.

The clause in issue makes reasonableness the basic criterion by which to distinguish legal from illegal prices. But the Court has tested the constitutional adequacy of reasonableness as a standard for demarcation of illegal prices in our competitive economy and has found it wanting. In every instance in which the question has been put to it, beginning with the leading decision in *United States v. L. Cohen Grocery Company*, 255 U.S. 81 (1921), the Court has held attempts to outlaw "unreasonable" prices to be unconstitutional.

The *Cohen Grocery* case involved the validity of the Lever Act which imposed a penalty upon any person who "wilfully" made "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." (255 U.S. at 86) Whether these words prohibiting unreasonable prices "constituted a fixing by Congress of an ascertainable

standard of guilt and are adequate to inform persons accused of violation thereof of the nature of the accusation against them" was the question posed. "That they are not" the Court thought obvious from their "mere statement." Nevertheless, it articulated the reasons for its decision, and the rationale is equally applicable to the "unreasonably low prices" clause here at issue:

> "Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." (255 U.S. at 89)

The Court pointed out that in earlier cases upholding statutes as sufficiently definite, none of which involved the legality of prices, "either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." (255 U.S. at 92)

The Court followed the *Cohen Grocery* precedent in a series of contemporaneous cases also involving the Lever Act.[14] And in *A. B. Small Company v. American Sugar*

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14. *Tedrow v. A. T. Lewis and Son Dry Goods Company*, 255 U.S. 98 (1921); *Kennington v. Palmer*, 255 U.S. 100 (1921); *Kinnane v. Detroit Creamery Company*, 255 U.S. 102 (1921); *C. A. Weed and Company v. Lockwood*, 255 U.S. 104 (1921); *G. S. Willard Company v. Palmer*, 255 U.S. 106 (1921); *Oglesby Grocery Company v. United States*, 255 U.S. 108 (1921). In *Weeds v. United States*, 255 U.S. 109, 111-112 (1921) the same rationale voided a different section of the Lever Act purporting to prohibit "conspiracies to exact excessive prices."

Refining Company, 267 U.S. 233 (1925) it held the Lever Act's blanket proscription of unreasonable prices unconstitutionally indefinite even for civil purposes, pointing out that no workable standard was provided:

> "The federal statute contained no provision pointing to what should be deemed a . . . reasonable . . . price; and there was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute. . . . While sugar has a market value, that value is subject to fluctuations which individual manufacturers and dealers can neither control nor readily foresee. The price in one trade center is affected by that in others, and in all there are material variations, even in short periods." (*Id.* at 240-241)

The same question was presented again in *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) testing a state statute outlawing certain conspiracies in restraint of trade unless "their purpose shall be to obtain only a reasonable profit . . ." (274 U.S. at 456). In an opinion by Mr. Chief Justice Taft the Court unanimously held the statute "so vague and uncertain [that it] . . . violates due process and cannot be distinguished from the case of *United States v. Cohen Grocery Company* . . ." (274 U.S. at 453-54). Such an exception in the statute, the Court said, "leaves the whole statute without a fixed standard of guilt . . ." (274 U.S. at 457)

Very recently the Court noted the relevance of these leading cases to the "unreasonably low prices" clause. In *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 378 (1958), Mr. Justice Harlan, speaking for the majority, referred to the clause as a "vague provision" and pointed out:

> "The District Court indicated that the vagueness of the 'unreasonably low prices' provision might give rise to constitutional difficulties, if such questions had to be faced. Cf. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, *Cline v. Frink Dairy Co.*, 274 U.S. 445. See Comment, 55 Mich. L. Rev. 845, 853-56 . . . ."

Indeed, the Court has consistently rejected reasonableness and comparably general indicators of legality as too vague to serve as standards of criminal guilt in complex economic situations. In *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1914), the Court invalidated a provision for prices based on "market value under fair competition, and under normal market conditions." To compel [businessmen . . . to guess at peril of indictment" the outcome of so complicated and contingent a question, the Court said in language directly applicable to the "unreasonably low prices" clause, "is to exact gifts that mankind does not possess." *Id.* at 223-24. The Court has repeatedly objected to similar provisions: *Connally v. General Construction Company*, 269 U.S. 385, 391-93 (1926) involving

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12. Id., n. 7. While the dissenting opinion in the *Nashville Milk* case, by Mr. Justice Douglas, urged that Section 3 is a proper foundation for private suits, the opinion was addressed to the section as a whole and mentioned particularly only its price discrimination prohibitions. The constitutional status of those provisions, however, may be different from the status of the "unreasonably low prices" clause which is not qualified by the definite requirement of discrimination.

13. The same result was reached in the companion cases of *Collins v. Kentucky*, 234 U.S. 634 (1914), *Malone v. Kentucky*, 234 U.S. 639 (1914) and *American Seeding Machine Company v. Kentucky*, 236 U.S. 660 (1915).

"current rate of per diem wages in the locality"; *United States v. Pennsylvania Railroad Company*, 242 U.S. 208, 237-38 (1916); reasonable request or notice, normal shipments; *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210 (1932), waste; *Musser v. Utah*, 333 U.S. 95 (1948) "conspiracy to commit . . . acts injurious to public health, . . . morals, . . . trade or commerce." See also *United States v. Shreveport Grain and Elevator Co.*, 287 U.S. 77 (1932), implying that the statute would be unconstitutional if construed as directly prohibiting "unreasonable variations" between actual and marked weight. Cf. *Smith v. Cahoon*, 283 U.S. 553, 564 (1931).

2. Antitrust Decisions of This Court Confirm That Reasonableness Is Not an Adequate Statutory Standard for Prices.

The provision challenged here presents the question of the constitutionality of a "reasonableness" test of prices in the context of antitrust policy for unregulated segments of the economy. The Court has repeatedly held that reasonableness of prices cannot be satisfactorily determined by the courts in competitive situations because of the inherent uncertainty of any concept of "reasonable price" and because the reasonableness of prices does not determine whether competition has been unreasonably diminished.

Since adoption of the rule of reason as the standard of construction of the Sherman Act in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), the Court has consistently refused to judge the reasonableness of prices in antitrust cases. Explaining this position in *United*

States v. Trenton Potteries Co., 273 U.S. 392 (1927), a price-fixing case, the Court relied expressly on the constitutional decisions, stating, per Mr. Justice Stone:

> "Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable,—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies. Compare *United States v. Colgate & Co.*, 250 U.S. 300; *United States v. Cohen Grocery Co.*, 255 U.S. 81; *International Harvester Co. v. Kentucky*, 234 U.S. 216; *Nash v. United States*, *supra*." (273 U.S. at 398)

The Court repeated its rejection of a reasonable price test in the leading case of *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). The Court held price-fixing to be unreasonable "per se" because inherently inconsistent with the maintenance of competition. But this conclusion of per se unreasonableness was sharply distinguished from the wholly different question of the reasonableness of prices fixed, with which the Court would have nothing to do. In the language of Mr. Justice Douglas:

> "If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

> "The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions."[14] (310 U.S. at 221)

The experience of this country has been that, when necessary in regulated segments of the economy, the administration of a standard of reasonableness of prices requires, as the opinion in *Socony-Vacuum* states, "continuous administrative supervision and readjustment in light of changed conditions." Accordingly the determination of reasonable railroad rates has been committed to the Interstate Commerce Commission, and of reasonable rates for airlines, natural gas pipelines and other regulated industries to other agencies. The historic doctrine of "primary administrative jurisdiction" was developed first in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) in recognition of the uncertainties inherent in determination of reasonable rates. Under this doctrine the courts refrain from liti-

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14. This doctrine has been applied consistently whether the prices fixed have been claimed to be high or low (*United States v. Trenton Potteries Co., supra*, involving fixing of high prices; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951), involving fixing of maximum, *i.e.*, low prices), showing that there can be no basis for distinguishing the statute in *Cohen Grocery*, directed at high prices, from the "unreasonably low" interdict of the clause in issue here.

gating reasonableness issues for the same reasons of complexity and uncertainty which render the "unreasonably low prices" clause invalid as a judicial standard. *United States v. Radio Corp. of America*, 358 U.S. 334, 346-48 (1959).

In World War II, Congress avoided the mistake of the Lever Act by establishing an administrative agency under the Emergency Price Control Act for the comprehensive control of prices. The complexities and difficulties which confronted the Office of Price Administration in its monumental task of determining proper price levels are well-known to the Court. Section 3 of the Robinson-Patman Act would call upon the trial courts to decide the same kind of price questions without standards, experience, or any centralized guidance. And their decisions would have not mere future effect, but would adjudicate, in a criminal proceeding with the liberty of individual defendants possibly at stake, the rightness or wrongness of past conduct.

3. Decisions Relied Upon by the Government Did Not Involve Situations Analogous to the "Unreasonably Low Prices" Clause.

The Government's attempt to overcome the force of this long line of precedent rests primarily on *Nash v. United States*, 229 U.S. 373 (1913), upholding Section 1 of the Sherman Act, and *United States v. Ragen*, 314 U.S. 513 (1942) upholding the Internal Revenue Code's prohibition of tax evasion accomplished by deliberate padding of busi-

ness expenses, reasonable deductions for which are allowed.[15] The *Nash* case was expressly considered in the *Cohen Grocery* and *Cline* opinions, both of which distinguished the question of unreasonable restraint of trade from that of unreasonable prices. The author of the *Nash* opinion, Mr. Justice Holmes, joined in the Court's opinions in both *Cohen Grocery* and *Cline*.

The Sherman Act was upheld because its language referred to and attained certainty from the common law. As Mr. Chief Justice Taft explained in *Cline* (274 U.S. at 460), in *Nash* "we held that the common law precedents as to what constituted an undue restraint of trade were quite specific enough to advise one engaged in interstate trade and

15. The other cases cited in the Government's brief (G.B. 24-27) on this point are not relevant here. The statutes in *Ratner v. California*, 321 U.S. 755 (1944), *Miller v. Oregon*, 273 U.S. 657 (1926), *Boyce Motor Line v. United States*, 342 U.S. 337 (1952), and *Sproles v. Binford*, 286 U.S. 374 (1932), relate to negligence situations, discussed *infra*, p. 32-33; see also the detailed explanation of *Miller v. Oregon* in *Cline v. Frink Dairy Co.*, 274 U.S. at 464-465 (1927). *Boyce* and *Sproles* invoke, beyond the common law standards of due care, a standard based on distance and actual alternative routes. Standards invoked by the statutes tested in the remaining cases are also definite: *United States v. Petrillo*, 332 U.S. 1 (1947) (coercion); *McGowan v. Maryland*, 366 U.S. 420 (1961) (products actually sold at beaches and amusement parks in the area); *United States v. Spector*, 343 U.S. 169 (1952) ("timely" defined by the statute to mean six months and "necessary" to mean the legal requirements for entry into an identified country). In *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 16-18 (1931) the statutory language had been given a definite and workable construction based on technological developments in the industry known to those affected by the statute.

commerce what he could and could not do under the statute."

Quoting from his early and now celebrated opinion in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898), the Chief Justice said in *Cline* (274 U.S. at 462) that whether there is an undue restraint of trade does not rest on so "'shifting, vague, and indeterminate a standard'" as does the question of "the reasonableness of prices." *Cohen Grocery* was not inconsistent with *Nash*, the *Cline* opinion pointed out, because *Nash* "did not relate to the reasonableness . . . of prices charged for necessaries, without more, as the basis for criminality, while . . . *Cohen Grocery* plainly did.[16]"

United States v. Ragen, 314 U.S. 513 (1942) has in no way diminished the authority and persuasiveness of these decisions. The act prohibited by the statute tested in *Ragen* was the wilful evasion of income taxes which, the Court pointed out, "standing alone, is not vague." (314 U.S. at 523-524) Obviously, whether a businessman has been guilty of tax evasion is a question that invokes an objective and familiar common law standard of determination, fraud, that is not present when the question is merely whether he has set an "unreasonable" price. "Such acts of bad faith," the Court observed, "are not beyond the ready comprehension

16. Id. at 463. The Court added that, for the same reason, *Cohen Grocery* was not inconsistent with *Waters-Pierce Oil Company v. Texas*, 212 U.S. 86 (1909), a case upholding on the common law basis a Texas antitrust statute outlawing, in addition to definitely described activity, "acts which . . . tend to accomplish the prohibited thing, or which make it highly probable that the given result will be accomplished . . ." (212 U.S. at 110).

either of persons affected . . . or of juries called upon to determine violations . . ." (314 U.S. at 524) The type of evasion involved in the particular case, the deliberate padding of business expenses, "reasonable" deductions for which are allowed, did not, the Court held, "so transform the nature of the offense as to make actors less aware that they are committing it or juries less competent to detect it." (*Ibid.*)

Thus both *Ragen* and *Nash* stand on a common law foundation. But, as Mr. Chief Justice Taft's exhaustive analysis of the cases in his *Cline* opinion points out, there is no common law tradition or experience for determination of reasonable prices.[17] Ascertaining whether there has been undue restraint of trade does not depend on establishing the unreasonableness of any price. (274 U.S. at 460-465) Neither does the venerable common law concept of the reasonable man, or reasonably prudent man, go to the determination of prices. The common law has looked to the reasonable man to measure negligence in situations in which community standards provide a test of reasonable behavior and conduct can be measured by common under-

17. Thus in *Ragen* if the provision for reasonable deductions had actually been the sole standard of guilt provided, the *Ragen* statute would still have derived certainty from the common law. Where the padding of expenses for tax purposes is concerned, the reasonably prudent man behaves predictably; in such a situation reasonableness may be viewed as "a standard of behavior . . . consistent with good morals." *American Telephone and Telegraph Co. v. United States*, 299 U.S. 232, 246 (1936). But setting unreasonably low prices is not "conduct traditionally recognized as morally 'wrong.'" *United States v. Harriss*, 347 U.S. 612, 634 (1954) Mr. Justice Jackson dissenting.

standing and practices." *United States v. Petrillo*, 332 U.S. 1, 8 (1947). As pointed out in *Cline v. Frink Dairy Co.*, 274 U.S. 445, 464 (1927):

> "... on an issue like negligence ... every one may be held to observe it either on the civil or criminal side of the court. It is a standard of human conduct which all are reasonably charged with knowing and which must be enforced against every one in order that society can safely exist. ... 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' 1 East P.C. 262."

"But this does not justify," the Court said, "holding the average member of society in advance to a rule of conduct measured by his judgment and action in respect of what is a reasonable price. ..." (274 U.S. at 464) "[I]t will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result." (274 U.S. at 465)

The Government's brief itself indicates the difficulty of the problem. The evidence used to evaluate reasonableness in this case on trial may include, it says, "the relationship between ... prices and the seller's costs, the seller's normal price structure, ... the general price levels in the market or industry ... the reasons why a low price was adopted, the expected period for which such a price will be in effect, ... its probable or intended impact upon

competition . . ." (G.B. 12), "business accounts and corporate books," "intracorporate communications . . . historic industry pricing problems, and the expert opinion of those familiar with the industry." (G.B. 22) Indeed, there is hardly any fact remotely relating to a challenged price that could justifiably be kept out of the record. But the ability to predict that all proffered evidence will be considered relevant does not provide a standard by which to evaluate it. Instead, it emphasizes the absence of a standard. See *United States v. L. Cohen Grocery Company*, 255 U.S. 81, 89-91 (1921); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 243 (1932).

The lower court here, far from deciding an abstract and hypothetical issue, as the Government suggests, faced the necessity of formulating instructions to a jury which would enable it to determine, by a standard apart from the individual jurors' differing subjective notions about it, whether the welter of statistical material necessarily to be in evidence proved the existence of any "unreasonably low prices." The briefs and argument in the court below were directed to the concrete and obviously fundamental problem of finding such an objective standard in the challenged provision.

Even more difficult is the problem faced by those subject to the statute who must set prices to be used in the future. By contrast, the *Ragen* statute dealt with a comparatively simple situation, a corporate income tax return filed long after the fact. There every relevant fact was fixed: the services rendered, the compensation paid, the reasons, and

the pertinent market conditions. A deduction claimed under such known circumstances is not comparable to a price set, as any price must necessarily be, on the basis of estimates, projections, and pure guess. Indeed, the Court's opinion in *Ragen* distinguished *Cohen* on just this basis: where an unreasonable price is prohibited, no standard was afforded (255 U.S. at 89, 92) whereas in the tax evasion situation "no such unworkable standards" were involved. *United States v. Ragen*, 314 U.S. 513, 523 (1942).[18]

Thus the clear judgment and experience of the Court, developed in a long line of cases, is that "workable standards" are not afforded for those subject to a statute, or for judge and jury, when the legality of a price in criminal cases is made dependent on its "reasonableness."

C. A Statute Which Proscribes No Ascertainable Act Cannot Be Made Constitutionally Definite by Requiring Intent.

The phrase "unreasonably low prices" clearly is not an adequately definite description of a criminal act. Does the additional statutory requirement of showing intent to destroy competition or eliminate a competitor change the

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18. The Court's remark that under the *Ragen* statute, "thousands of corporations have filed income tax returns . . . and there has not been any apparent general confusion . . ." (314 U.S. at 524) contrasts markedly with its observation of the unworkability of the "unreasonably low prices" clause of Robinson-Patman: "it is worthy of note that the Department of Justice has never, so far as we have been able to determine, brought proceedings under this provision . . ." *Nashville Milk Co. v. Carnation Company*, 355 U.S. 373, 378, n. 7 (1958).

result, as the Government argues? (G.B. 29-32) The answer is clear; in the words of Mr. Justice Douglas: "willful conduct cannot make definite that which is undefined." *Screws v. United States*, 325 U.S. 91, 105 (1945); Indeed when the act prohibited is unascertainable, any requirement of intent becomes a nullity. No one can be held to intend something which is unknown and unknowable.

The *Screws* case, which is cited by the Government, illustrates the Court's unwillingness to let an intent requirement substitute for a sufficient description of the act prohibited. The Court upheld Section 20 of the Criminal Code, punishing those who wilfully deprive others of rights guaranteed by the Fourteenth Amendment. Although those rights are not defined in the statute, the determinative opinion written by Mr. Justice Douglas, joined by three others, viewed the protected rights as ascertainable when the statute was construed as limited to rights specified in decisions or other rules of law. The statute having thus been made "in some respects" certain, the additional construction of the statutory word "willful" to require criminal scienter, or acting with the deliberate bad faith intention of doing what the statute prohibits, was held to provide the requisite notice (325 U.S. at 102).[19] Bad faith was

19. Three other cases cited by the Government involved the same statute: *United States v. Classic*, 313 U.S. 299 (1941); *Williams v. United States*, 341 U.S. 97 (1951); *Koehler v. United States*, 342 U.S. 852 (1951), Mr. Justice Jackson dissenting from the denial of certiorari. In *Classic*, the vagueness issue was not raised, Mr. Justice Jackson's opinion in *Koehler* is at variance with the position the Government takes here, and *Williams* simply follows *Screws*.

definitely not considered a substitute for adequate indication of what was outlawed. It was made quite clear that all the bad faith in the world would be insufficient if the statute provided for the punishment of "an unknowable something." The Court said:

> "We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.
>
> "Once . . . given that construction, we think that the claim that the section lacks an ascertainable standard of guilt must fail. * * * [Persons who act . . . in open defiance . . . of a constitutional requirement which has been made specific and definite . . . [and] are convicted for so acting. . . . are not punished for violating an unknowable something." (325 U.S. at 103, 105)

On this point of law a majority of the Court were in express agreement. The dissent by Mr. Justice Roberts, joined by Justices Frankfurter and Jackson, pointed out (325 U.S. at 154):

> "'Willfully' doing something that is forbidden, when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, is not rendered sufficiently definite by that unknowable having been done 'willfully'."[20]

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20. In other cases relied upon by the Government the standard, though sometimes broad, was clearer than in *Screws*. The Espionage Act tested in *Gorin v. United States*, 312 U.S. 19

Indeed, if a requirement of bad faith will save an otherwise unconstitutionally vague statute, the Court would have upheld the statutes involved in *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921) and *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927). The prohibition of the Lever Act was limited to wilful acts, and the Colorado statute invalidated in the *Cline* case prohibited combinations in restraint of trade only when they were not engaged in for a reasonable purpose. Even the section of the Lever Act prohibiting "conspiracies to exact excessive prices" was held unconstitutional, and it was done in a case brought to this Court after conviction. *Weeds v. United States*, 255 U.S. 109 (1921).

In *Cramp v. Board of Public Instruction of Orange County, Florida*, 82 S. Ct. 275 (decided December 11, 1961) the Court unanimously recognized that criminal intent does not save an otherwise vague statute. The statute in *Cramp* had

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(1941), as construed, outlawed obtaining or delivering things specifically described in the statute, connected with or relating to the national defense, and the Court found "national defense" to have "a well understood connotation"; it said that if the statute described an area of proscription that might include documents that were not secret, "the obvious delimiting words were those requiring . . . bad faith. . . ." (312 U.S. at 27-28) Similarly the act proscribed in *United States v. Petrillo*, 332 U.S. 1 (1947) was ascertainable by reference to "common understanding and practices" (332 U.S. at 8), and in *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952) by "use of common experience as a glossary" (342 U.S. at 341, quoting from *Sproles v. Binford*, 286 U.S. 374, 393 (1932)). In both cases the requirement of scienter made it even clearer that no one would be convicted without fair warning, but in these, as in the earlier cases discussed by Mr. Justice Roberts in his dissent in *Screws*, scienter is mentioned only "for good measure." (325 U.S. at 156)

been authoritatively construed to include a requirement of criminal intent (325 S.Ct. at 279). But the Court nevertheless found that the provision under attack was "completely lacking in . . . any . . . terms susceptible of objective measurement" and was unconstitutionally vague (325 S.Ct. at 280).

Moreover, in the statute at issue here there is no necessary relationship between the act proscribed and the intent required. Unlike a requirement that a particular statute be wilfully violated, as in *Screws*, the intent here could accompany almost any innocent business act. It does not define or clarify the act proscribed but is independent from it. It thus differs completely from an intent to act illegally which is the kind of intent involved in the cases relied upon by the Government. Thus the intent specified here cannot serve the notice function required by the Constitution because it adds no meaning to nor in any way clarifies the phrase, "unreasonably low prices."

Far from preserving the intent requirement of this statute as an independent standard, the Government's brief shows that its proof of an unreasonably low price in this case will constitute its proof of illegal motive, and vice versa. (G.B. 10-12). Thus the "assurance of protection" which the Government claims is provided by the intent requirement (G.B. 29-32) actually, as Mr. Justice Jackson said, "becomes a hoax" because "the requirement of specific intent is now to be wiped out with a presumption." *Koehler v. United States*, 342 U.S. 852, 854 (1951, dissenting from denial of certiorari).

There is no warrant in the statute itself for this kind of circumlocution. Despite the vagueness of the "unreasonably

low prices" clause its language requires that before conviction can be had there must be separate proof that the price challenged (1) was unreasonably low and (2) was set for the purpose of destroying competition or eliminating a competitor. To say that illegal motive defines the act proscribed is to make the motive a definition of unreasonableness, whereas the language shows Congress must have intended two separate tests. The result of the Government's approach would be a statute quite different from the one Congress wrote, a statute outlawing any price set for the stipulated purpose. Reasonableness would be deleted from the act. Construction of a statute in a manner so clearly at variance with "the natural import of its terms" (*United States v. Shreveport Grain and Elevator Co.*, 287 U.S. 77, 83 (1932)) would in itself constitute a deprivation of fair warning. *United States v. Cardiff*, 344 U.S. 174, 176-177 (1952).

D. The Vagueness of the "Unreasonably Low Prices" Clause Is Increased by Its Incongruity with the Other Provisions of the Robinson-Patman Act and with Antitrust Policy.

While vague language sometimes acquires clarity from its context, the opposite is true of the "unreasonably low prices" clause. Attempt to construe this clause on the basis of its context as part of the Robinson-Patman Act and of antitrust policy merely makes it more inscrutable.

The clause is confusing when related to the remainder of Section 3 of the Robinson-Patman Act, of which it is a part. (See Appendix to this brief.) The whole section bears the heading of "discrimination," and the first two of its

three clauses both deal with discrimination, the first clause relating to discrimination between competing purchasers, and the second to geographical price discrimination. The natural expectation created by this context is that the third clause also would deal with discrimination, an impression made stronger by the fact that all of the clauses constitute a single sentence, separated only by semicolons, and that all have a single subject, grammatically speaking.

The indictment itself reflects the uncertainty of the Government as to whether some kind of discrimination is required. Each Robinson-Patman Act count contains a paragraph alleging that National "utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war . . ." (*E.g.* R 9) This language is suggestive of a geographical price discrimination theory *i.e.*, that defendant "subsidized" low prices in one market by charging higher prices elsewhere. The charge is thus a confusingly vague version of the second clause of the Act, but without ever actually charging the defendants with discrimination.

The Government Brief is permeated with this confusion of the unreasonably low price provision with the subject of price discrimination. The brief contends that in passing the original Section 2 of the Clayton Act in 1914 Congress intended to legislate on unreasonably low prices (G.B. 14). But the original Section 2 dealt solely with *discrimination* in prices, and the House Report which is quoted at length in the brief shows this on its face.

Similarly, the legislative history of the Robinson-Patman

Act in 1936 shows that what concerned Congress was the problem of discrimination. The civil provisions of the Act, which amended Section 2 of the Clayton Act and which were based on the Robinson-Patman bill, all deal with discrimination. (See Appendix to this brief.) Also, as the government admits, hearings on the Borah-Van Nuys bill were "primarily concerned with price discrimination." (G.B. 16) As pointed out above, as a separate prohibition apart from discrimination the unreasonably low prices clause received scant Congressional attention. While the Government has cited a few references to the clause, they are isolated and unilluminating. The Government brief expressly submerges the unreasonably low prices clause in the subject of discrimination when it states that one of the "chief aims of the legislation was to strengthen, and thus to make more effective, *the various prohibitions of the Clayton Act on geographic price discrimination, including the ban on predatory selling below cost.*" (G.B. 15; emphasis added)

The same confusion of the two subjects occurs in the brief's citation of cases which it says illustrate past recognition by the courts and the Federal Trade Commission of problems of unreasonably low prices. The case of *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234, 237 (2d Cir. 1929) (cited in G.B. 13) plainly was not a mere low price case. It was brought under the original price discrimination provisions of Section 2 of the Clayton Act and is a classic case of geographical discrimination of the kind dealt with in the second clause of Section 3, not in the third clause. Also, *Federal Trade Commission v. Anheuser-Busch*, 363 U.S. 536 (1960) and *Moore v.*

Mead's Fine Bread Co., 348 U.S. 115 (1954), (cited at G.B. 14) both involved allegations of discrimination through selling at prices which were lower in one market than those charged in other markets. The other cases cited by the Government were Sherman Act cases involving charges of monopolization or conspiracy and are even less relevant here.[21]

Equally vexatious problems of meaning arise in comparing Section 3's criminal prohibitions with the civil prohibitions of Section 2 of the Clayton Act, as amended. (See Appendix to this brief.) The "unreasonably low prices" clause has no parallel in Section 2. Further, the prohibitions of Section 2(a) against discrimination in price are expressly qualified by the requirement that adverse effect on competition must be shown (*Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948); *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960)), and three important substantive defenses to price discrimination are expressly provided by the statute: cost justification, changing market conditions and good faith meeting of a competitor's equally low price. *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951).

In contrast, Section 3 makes no provision either for a test of effect on competition or for any substantive defense. This situation is the exact opposite of what would reasonably be expected. Criminal prohibitions customarily are differentiated from civil prohibitions by requiring more,

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21. *United States v. American Tobacco Co.*, 221 U.S. 106, 160-61 (1911); *American Tobacco Co. v. United States*, 328 U.S. 781, 807 (1946); *United States v. Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y. 1916).

not less, culpable conduct than required for civil offenses and by providing for more, not less, opportunity to defend. No doubt this anomolous departure was due to the fact that Section 3 was not drafted by those who sponsored the civil provisions, but was of independent origin, and in order to insure passage was tacked on to the civil provisions without any reconciliation of the substantive differences. But the result, in the words of a student of the history of the Robinson-Patman Act, was a "melange of partially incongruous and often vague provisions."[22]

All attempts to reconcile the confusing inconsistencies of these two sections are confronted with the severe problem described by Congressman Celler when the House Conference Report was being discussed in 1936. He stated:

> "In an endeavor to get some sort of an agreement, the so-called Borah-Van Nuys provisions of the Senate Bill were grafted onto the House bill, and we have what might be termed in common parlance somewhat of a 'hodgepodge'. . . . when you try to read them both together you have the greatest difficulty. You have the herculean task to make it yield sense." (80 Cong. Rec. 9419)

Finally, grave doubts concerning the meaning of the unreasonably low prices clause are greatly deepened when the clause is set down in the broad context of the antitrust policy governing price competition. As pointed out above, the Court has repeatedly refused to substitute the judgment of the courts for that of the market as to the reasonableness of prices. This is because ever since 1890 the Court has adhered to the proposition that the "heart of

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22. PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION 228 (Harv. Univ. Press 1955).

our national economic policy" is "faith in the value of competition," *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 248 (1951), and that competition in price is so vital a form of competition that it is protected by the rule of "per se" unreasonableness from restraints upon it. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

While government may of course impose restraints upon competition which would not be tolerated if privately imposed, *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), private citizens have been taught that vigorous low-price competition is one of our highest economic values. Antitrust policy thus leads businessmen to believe that the "unreasonably low prices" clause does not mean, as the Government here says it does, that one who competes vigorously by a policy of low prices thereby treads at all times on the borderline of criminal illegality. This background makes the meaning of the "unreasonably low prices" clause even more difficult to ascertain than it would be if our basic policy were not so heavily oriented in favor of price competition.

The requirement of the "unreasonably low prices" clause of showing an intent to destroy competition, in which the Government brief continually tries to find a solution for all of the statute's problems of vagueness, far from contributing clarity, adds to the difficulty when seen in this context. In competition, some succeed at the expense of others, and each individual competitor acts with the intention of being among those who succeed. All of his business decisions are intended to get business and, unless

he enjoys a monopoly, he intends to take business from others. In this battle for economic survival price is a primary competitive weapon and rarely, if ever, is a competitive decision on price reached free of any contemplation of economic detriment to others.

The intent made suspect in the "unreasonably low prices" clause differs from this normal economic objective only as a matter of degree which is extremely difficult to determine. Businessmen who are fully advised of the consequences of the Government's theory may believe that to be sure of complying with the statute they should reject the ordinary economic objective of price competition. Safety will seem to lie only in keeping prices at the same level as, or higher than, those of competitors. Even this may not prevent accusation. As this case demonstrates, indictment may follow merely from meeting a competitor's price. (R 37-38) And if the price is considered to be "below cost", it will be presumed by the Government to have been set with the intent the statute condemns. (G.B. 10-12)

Anticipating these objections, the Government says (G.B. 20) that it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line" (quoting *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952)). But it is manifestly unfair to impose the risk of criminal conviction when the line is not visible, and then to add that one will be found guilty if, as he approaches the unseen line, his outlook is the one he is ordinarily encouraged to have. It is not "familiar to the criminal law" to make anyone take such a risk. *United States v. Wurzbach*, 280 U.S. 396, 399 (1930).

E. The Defective Vagueness and Dubious Validity of the "Unreasonably Low Prices" Clause Have Been Expressly Recognized by the Department of Justice and by Most Writers.

The extraordinary nonuse of the "unreasonably low prices" clause by the Department of Justice evidently has been due to its serious doubts as to the meaning of the language. In 1960, the Department opposed on grounds of vagueness the use of the same words in a bill intended to establish civil remedies for "unreasonably low prices" and for other purposes. Its views were stated in a letter to the Committee on Interstate and Foreign Commerce of the House of Representatives, signed by John D. Calhoun, Acting Deputy Attorney General.[23] The bill was introduced by Representative Patman and was designed to overrule *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958). It provided that prohibitions similar to those contained in Section 3 should be violations of the Federal Trade Commission Act and should also be available for private suits. The bill was more specific than Section 3, however, in that it included provisions for definition of the "unreasonably low prices" clause. The Department opposed the bill stating:

> "These bills would carry over many of the ambiguities inherent in the present language of section 3 of the Robinson-Patman Act and would add to them other difficulties and uncertainties, as indicated above." (Hearings, 7)

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23. *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R.* 10235, 86th Cong. 2d Sess., 6-7 (1960).

The great difficulty involved in formulating any clear meaning for a prohibition of "unreasonably low prices" is shown by the Department's conclusion that the definitions of the Patman bill not only did not remove ambiguities, but instead added further "difficulties and uncertainties." After the bill was revised and reintroduced in the First Session of the 87th Congress as H.R. 127, the Department of Justice again opposed it for the same reasons, by letter of William A. Geoghegan, Assistant Attorney General.[24]

It is extremely odd that the Government refers to the views of Representative Patman to support its contention that the "unreasonably low prices" clause of the present statute can be given a constitutionally definite meaning. (see G.B. 17 at n. 5) The bills introduced by Mr. Patman, by their attempt to provide a detailed set of definitions, reflect a clear belief that the phrase as it stands in Section 3 is too vague. This belief is the same held by Mr. Patman in 1936 at the time of passage of the Act. On the floor of the House, he attacked the Borah-Van Nuys bill, which became Section 3, on the ground that it was "very hastily drawn." Expressly criticizing the unreasonably low prices clause, he called it "very indefinite as to what is an unreasonably low price." (80 CONG. REC. 8227, 8228)

This belief was shared by other Congressional leaders. Congressman Celler, as pointed out above, opposed the Borah-Van Nuys bill because the incongruities produced by attaching it to the original Robinson-Patman bill made interpretation a "herculean task." (80 CONG. REC. 9419)

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24. B.N.A., ANTITRUST & TRADE REG. REP., p. A-2 (Aug. 22, 1961).

The detailed review of the legislative history by Professor Palamountain points out that the Senate generally failed to resolve these incongruities because of "inability to agree on policy when confronted with the conflicting demands of independents, manufacturers, and mass distributors."[25] The result is a combination which is so incongruous and vague that in context Section 3 "may not" have "any meaning."[26]

That the vagueness of the provision in issue raises grave constitutional doubts has been the consensus of students of the subject. The Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) concluded:

> "Doubts besetting Section 3's constitutionality seem well-founded; no gloss imparted by history or adjudication has settled the vague contours of this harsh criminal law." (*Id.* at 201)

The same doubts have beset writers who have specifically analyzed the problem. Comment, 55 MICH. L. REV. 845, 853 (1957); Comment, *Federal Remedies Available Against One Who Sells at An Unreasonably Low Price*, 9 INTRA L. REV. (N.Y.U.) 239, 242-44 (1954); Note, 100 U. OF PENN. L. REV. 1058, 1060-61 (1952); Comment, *The Meaning and Judicial Interpretation of Section 3 of the Robinson-Patman Act*, 49 NW. U.L. REV. 273, 292-93 (1954); Note, 108 U. OF PENN. L. REV. 116, 122 (1959).

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25. THE POLITICS OF DISTRIBUTION 228 (Harv. Univ. Press, 1955).

26. *Ibid.* at 231.

Indeed, it is a fair summary of the views of the writers to say that the "unreasonably low prices" clause has acquired a general reputation for dubious constitutional status. It remains for the Court to give final approval to what has been from the beginning a general belief that this unique statutory provision will fall before the mandates of the Fifth and Sixth Amendments. In view of its nonuse by the Department of Justice and its unavailability for use by any other agency or person, its disappearance is not likely to weaken antitrust enforcement.

III. THE CONSTITUTIONALITY OF THE "UNREASONABLY LOW PRICES" CLAUSE CANNOT BE TESTED IN TERMS OF SALES BELOW COST

The Government seeks to preserve the indictment in this case by arguing that, whatever the statutory phrase "unreasonably low prices" may mean, it should at least be construed to mean selling below cost. It has already been pointed out that the indictment in this case is not limited to sales below cost, and that even if it were the constitutional validity of the statutory provision must be tested by considering its language rather than the language of the indictment.

In any event, the Government's theory is unsatisfactory on the merits. Selling below cost is not what the statute prohibits, and the "unreasonably low prices" clause cannot be construed in the way attempted by the Government. Further, even if the Government's construction were possible,

the result would merely be to substitute one indefinite and impracticable standard for another. For without detailed definition "cost" has no settled meaning either in common understanding or in law.

A. Selling Below Cost Is Not Inherently Unreasonable.

The whole thesis of the appeal rests upon a premise which cannot withstand analysis. The Government states:

> "Selling below cost in the absence of special circumstances is explicable only as part of a campaign to destroy competition; and it inevitably will have that effect." (G.B. 10)

The flaw in the Government's approach lies in the attempt to make "sale below cost" equal "sale at an unreasonably low price." The flaw is that though the phrase, "sale below cost," may indicate a kind of sale at a "low price," it plainly is not in itself synonymous with "unreasonable" conduct. This is shown by the Government's own acknowledgment of what it calls "special situations" where selling below cost would be at prices which are reasonably, not unreasonably, low. (G.B. 11.) The brief enumerates a few: disposing of excess inventory; selling obsolete or spoiling merchandise; closing out a line which the seller wishes to discontinue; introducing a new product or breaking into a new market; and meeting competition in good faith.

These "special situations" obviously occur frequently enough to show that "sale below cost" is not equivalent to sale at "unreasonably low prices." But the Government's list is far from complete. Undoubtedly the Government

would also acknowledge other situations where sales below cost would be reasonable, including the following: sales which prove to be below cost because the seller has overestimated the volume he would sell at the announced price; sales which are below cost because costs unexpectedly increase during the selling period and the seller is unable to raise prices because of contract obligations, or because of competition; sales which are below cost because the seller is less efficient than competitors, and is losing out in the competitive struggle; sales which are below cost because of inefficiency, but which are made in order to stay in the market while more efficient methods are introduced; sales of items which are carried for the convenience of customers whose main patronage is as to other products; and sales made to stimulate business, such as two-for-one promotions and "one-cent" sales, or sales of one product at a low price for the purpose of advertising the seller's whole business.[27]

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27. Such sales for advertising or promotional purposes are sometimes called "loss leader" sales. The Department of Justice and the Federal Trade Commission historically have vigorously opposed "Fair Trade" legislation designed to prevent such sales by legalizing resale price maintenance. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 153 (1955). The Government has vigorously prosecuted under the Sherman Act sellers who undertake to prevent "loss leader" sales by actions which are outside the ambit of Fair Trade exemptions. *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960); *United States v. McKesson & Robbins*, 351 U.S. 305 (1956). The Court itself has been alert to condemn the use of court process to enjoin such selling in the absence of a clear exemption. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). The Government would therefore presumably agree that so-called "loss leader" selling is not always unreasonable.

It is thus obvious that there are a great many situations in which selling below cost cannot be regarded as improper conduct. In 1960, there were 15,445 industrial and commercial business concerns which failed. (Statistical Abstract of the United States, 1960, 498) In the same year, there were almost 4,000 bankruptcy cases filed in the District Courts involving bankrupt merchants and manufacturers. (*Id.* at 500) Many, if not most, of these failing enterprises undoubtedly were forced to make substantial sales at unprofitable prices. The Government argument overlooks the fact that the usual result of selling below cost for a substantial period is not destruction of competition, as it claims, but failure of the unfortunate concern which for any reason must make such sales.

In contrast to the frequency of innocuous reasons for below-cost sales, such sales for unjustified reasons are rare, in so far as reported cases are concerned. Although the Government contends that the "whole history of antitrust law" confirms the impropriety of selling below cost (G.B. 12), it cites very few antitrust cases which it claims involved such selling. (G.B. 13)

Further, the cases cited do not hold that selling below cost is in itself unreasonable. In *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), selling below cost was not condemned in itself; it was only one of many practices, many of which were plainly lawful by themselves, from which a conclusion of illegal monopolizing was drawn. In the later case of *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), the price cutting which occurred was attacked because it was done pursuant to a conspiracy to

monopolize, and it was the conspiracy which was the crux of the illegality. *United States v. Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y. 1916), was another case in which selling below cost was only one of many acts engaged in by an illegal combination. The fact that this case did not hold going below cost to be the essence of the wrong is shown by the Government's own reference to the same case elsewhere to show that selling at prices *above* cost may also be "unreasonable." (G.B. 21, n.7) *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234 (2d Cir. 1929) was a case in which the crux of the illegality was price discrimination, rather than below-cost sales. By re-aligning the order of its phraseology, the Government brief (10-11) obscures the import of the opinion in *Ben Hur Coal Co. v. Wells*, 242 F.2d 481 (10th Cir. 1957). There the court did not hold that selling below cost inherently constitutes selling at unreasonably low prices. It stated: "It would be . . . inadmissible to say that one who consistently sells at a loss *without competitive compulsion* is not selling at unreasonably low prices." (242 F.2d at 486, emphasis supplied) The qualification, "without competitive compulsion," and the word, "consistently," both show that the court had well in mind the many business situations which will necessitate selling below cost, and the statement is far from declaring such sales to be presumptively wrongful.

Confronted with the fact that there are so many "special situations" that they virtually swallow its generalization that selling below cost is "explicable only as a part of a campaign to destroy competition," the Government tacitly acknowledges that selling below cost cannot alone be equated with

"unreasonably" low pricing. It does so by putting to one side the situations of valid selling below cost, stating that they are not prohibited by the statute because they are not done with intent to destroy competition. G.B. 11. It then states that "unreasonably low" means "sales below cost with such purpose", or "predatory sales below cost". G.B. 15.

There are two subtle fallacies in this approach. The first is a familiar form of question-begging. The assertion that sales below cost are "explicable only as a part of a campaign to destroy competition" is proved by defining "sales below cost" as "sales below cost with predatory intent." The second fallacy consists in twice using the statute's test of intent to destroy competition. Predatory intent would first have to be found in order to bring the transaction within the class of "unreasonably low prices." The same proof would then be used over again to establish that the prices were illegal. This use of predatory intent to satisfy both parts of the statute's burden would make nonsense of the "unreasonably low prices" clause and results from the strained effort to rewrite the law. This is not the statute which Congress enacted.

Neither the legislative history of Section 2 of the Clayton Act in 1914 nor that of the Robinson-Patman Act in 1936 shows, as the Government claims, a recognition that "selling below cost should be prohibited as a dangerous device for destroying competition." G.B. 13. This statement is obviously incorrect as a characterization of legislative intent in 1914, for the original Section 2 of the Clayton Act dealt only with price discrimination and did not contain any

kind of prohibition either of unreasonably low prices or of sales below cost.

More importantly, there is no support for the contention that the legislative history of the "unreasonably low prices" clause in 1936 shows that Congress believed that it was enacting a prohibition of sales below cost. If selling below cost had been the well-recognized evil that the Government claims, Congress would have dealt with the matter expressly, but it did not do so.

Further, the references to the hearings claimed by the Government to show that Congress intended to legislate on selling below cost do not support the assertions made in the brief. (G.B. 16) In none on S. 4171, before the Senate Judiciary Committee, 74th Cong., 2d Sess., did the remarks made single out below-cost selling as a pernicious evil in itself, apart from discrimination, or state that the purpose of the "unreasonably low prices" clause was to prohibit such sales. Examined in the order of the Government's references, at page 14 of the hearings the testimony consisted of a question as to whether chain store use of "loss leader" selling was objectionable and an answer by the witness, a member of the Harvard Business School faculty, that the use of "loss leaders" was not confined to chain stores but "has been a method of sales promotion for a great many years." The testimony at page 18 consisted of a question as to whether selling below cost should be permitted to meet competition, with the answer of the witness that one who sells below cost for very long "will undoubtedly go bankrupt." The testimony at page 64 does not even mention sales below cost, and while the

witness referred to the unreasonably low prices clause briefly, he disapproved of the use of criminal penalties for this provision. At pages 85-86, the witness did not attack selling below cost as such, but did attack the use of "loss leader" selling, which he erroneously believed was covered by the bill. At page 53, Senator Borah did not say what he is quoted as saying in the Government brief, *i.e.*, he did not say that his bill was intended "'to stop' 'selling at less than cost.'" (G.B. 16) What Senator Borah said was, "... we want to stop *that*." (Emphasis supplied) The antecedent of the word "that" is ambiguous, but may well have been the practice being discussed by the witness and another Senator of selling to *some* customers at below cost, while selling to others at higher prices, *i.e.*, discriminatory sales.

The outstanding fact about the legislative history, as previously pointed out, is that the bill was borrowed from Canada with no reported meaning having been attributed there to its provisions. The Government, it will be noted, does not contend that there is any Canadian authority for reading "sales below cost" as an equivalent of unreasonably low prices. The bill was passed by Congress with no definitive exposition of the "unreasonably low prices" clause. The effort to find in this sparse record authority for the sales below cost theory of the Government is therefore misleading and futile.

There is thus no basis in the language of the statute, in the cases, or in history, for the radical rewriting attempted by the appellant's brief.

B. "Selling Below Cost" Is a Vague and Indefinite Standard.

Even if it were possible to read the unreasonably low prices clause as if it were a prohibition of selling below cost, the statute would not be sufficiently definite to satisfy Constitutional requirements. As an abstract concept, "cost" may be readily understood. But "cost" is not a sufficiently definite standard to serve as a dividing line between legal and criminal conduct, unless it is carefully defined.

In order for a seller to know whether his price in a given sale is "below cost," he must answer at least two basic questions. He must know what kind of costs are to be included, and he must know what method is to be used to determine those costs. He must know both things before the sale is made. But neither question can be answered by reference to the statute. The statute provides no definitions, and the Government brief has offered none. Instead, the brief contends that ascertainment of cost is not difficult, and that judges and juries can "easily" determine appellee's guilt or innocence on the basis of "cost." (G.B. 21) But nowhere are these gratuitous assumptions supported by any definitive demonstration of what the governing costs will be or how they are to be determined.

The term "cost" may refer to greatly different things. It may refer to the cost of the defendant, or it may mean the cost or costs of other members of the industry. While it might seem at first glance that the seller's own cost should be determinative, the formulation of a general rule based upon this assumption may be impracticable. It must

be remembered that the costs of different firms are usually different. Accordingly, there are situations in which it might be argued that the purposes of the law might be better served by adopting some other test of relevant cost. Suppose the defendant's costs are lower than those of his competitors, and that he persistently sells at prices which are always below their costs but which are profitable to him. Will he be safe in assuming that the Government will not prosecute him, even if he should eliminate all his competitors? Or conversely, suppose that a seller's costs are higher than those of competitors. Does the statute impose upon him the risk of violation if he goes below his own cost, or would it not seem more reasonable to say that in such a case he may use his competitor's cost as a standard? The situation is, of course, much more complicated if there are several competitors each with different costs. Which one will govern, or will some kind of average cost be used?

Even if it were clear whose cost will govern, it would still be unclear as to what costs will be included in the computation, and here again the statute supplies no guidance. The most easily ascertained cost, especially for retailers, would be the direct cost of goods sold. Retailers, with stores handling hundreds or thousands of different items, might reasonably believe that "sale below cost" would mean sale below the invoice cost of the merchandise. Such retailers obviously seldom know, or can take time to consider, their other costs when pricing a single item in a store-full of items. Also, processors such as dairy concerns might in some instances believe that they were not selling below cost for purposes of such a statute as this if they sold one of their

products above the cost of the major raw material used. These uncertainties as to what would constitute below-cost sales are greatly increased by the fact that, in deciding whether to make a given sale, a businessman naturally will reflect the familiar maxim of economics that operations are not unprofitable if they produce revenue which covers marginal cost.

But it will probably be contended by prosecutors that "cost" must include total actual costs, and not only all direct costs but also a proper allocation of the indirect costs of doing business. Again the statute provides no guidance on this subject, which is enormously complicated by a variety of factors which will greatly alter the result. The difficulties are well stated by the Department of Justice letter to the House Interstate and Foreign Commerce Committee in 1960, opposing H.R. 10235 in the 86th Congress, Second Session (*supra*, p. 47). The bill defined "unreasonably low prices" as including a sale "at a price below cost as such term is defined by the law" of an applicable state sales-below-cost statute. In the absence of a state law, the bill provided the following definitions for sales below cost:

> "(1) in the case of a producer, a sale at a price less than the cost of manufacturing, packaging, and selling a commodity together with the payment of such transportation costs as are actually borne by a producer; and
>
> (2) in the case of any other vendor, a sale at a price less than the invoice or replacement costs of the commodity plus the overhead cost and other costs of the vendor doing business."[28]

28. *Hearings Before A Subcommittee of the House Committee on Interstate and Foreign Commerce*, 84th Cong., 2nd sess., at 6 (1960).

Although these definitions made the bill far more certain than the present statute as construed by the Government would be, the Department of Justice nevertheless objected to them as "vague and uncertain." It criticized the references to state law in part on the ground that it would be difficult to determine which law would apply, the point to the criticism being that different states define cost differently. It criticized the definitions quoted above as follows:

> "The definitions to be applicable in the absence of State law would also present problems, particularly with respect to the meaning of the word 'cost.' The cost of manufacturing, of packaging, of selling, not to mention overhead cost, are all imprecise terms as to the meaning of which there will no doubt be disagreement." (Hearings 7)

The Department added that these bills would "carry over many of the ambiguities inherent in the present language of section 3 of the Robinson-Patman Act and would add to them other difficulties and uncertainties . . ." (*Id.* at 7)

The Federal Trade Commission also opposed the bill for similar reasons. It found that the above-quoted definition was "too general and leaves unanswered many questions." (*Id.* at 4) It added that state laws vary in their definitions of cost, and consequently, "what would be lawful with respect to sales into one State would violate Federal law with respect to sales into another." (*Ibid.*)

There are about 30 states having laws of general applicability imposing certain prohibitions upon sales below cost under defined and qualified circumstances, and others

which have laws relating to specific commodities. (2 Trade Reg. Rep. par. 6571, *et seq.*) Practically all of these laws define "cost," detail the elements which must be included in the determination of cost and provide some basis for determining cost. (Id. at par. 6691) Thus, virtually all the legislatures recognized a need to clarify the "cost" concept. Nevertheless, the variation in these detailed provisions is itself eloquent evidence of the difficulty of deciding what "cost" is. A majority of the statutes do not stop with definitions but seek further to reduce uncertainty by specifying an arbitrary percentage markup to be added to the cost of goods of wholesalers and retailers. This markup is an arbitrary legislative determination of what will be considered the defendant's cost of doing business unless the defendant can show that his actual costs were lower. It is interesting to note that there is even great variation from state to state in these statutory percentages. Different statutes provide for 2%, 4%, 5%, 6%, 7%, 8% and even 12% (Id. at par. 6709), showing basic disagreement as to what a reasonable allowance or average for costs of doing business should be.

Despite their detailed definitions some of the state statutes have encountered constitutional difficulty on grounds of vagueness and uncertainty. (*Id.* at par. 6629) No state statute which fails to define cost has been upheld against an attack for vagueness, so far as we have been able to determine. The Supreme Court of Kansas recently invalidated under the Federal and State constitutions provisions of a statute governing sales of milk which made it unlawful to sell milk "for less than cost to the wholesaler, processor or distributor at the point of delivery." *State v.*

Fleming Co., 184 Kan. 674, 339 P. 2d 12 (1959). The court declared this provision unconstitutionally vague partly because it contained no definition of cost, stating:

> "It is argued that in this day and age, every-one in business has the services of accountants, but it will be seen that the statute leaves unanswered the question of whether the cost is to be determined as of a particular shipment or based upon business for a week, a month, six months or a year. The statute is totally silent as to what expenses are to be included in arriving at the cost at the point of delivery." (184 Kan. at 681, 339 P. 2d at 17)

There, the state argued, as the Government does here, that the defendant would know his own costs and could therefor comply with the statute. The court did not accept this oversimplification, stating:

> "The appellant would read the statute to simply provide that the appellees should keep books in good faith. But we cannot feel that the interpretation of the statute is so simple." (*Ibid*)

The Federal Trade Commission, which the Government brief claims "has experienced no great difficulty in assessing the evidence and upholding charges of sales below cost" (G.B. 23) actually regards determination of cost as an extremely complicated matter and believes that even a civil provision prohibiting sales below cost which the Commission would administer should have a highly detailed definition of cost. It proposed to the House Committee, *supra*, a spe-

cific definition of cost, which is set forth in the footnote.[29] Comparison of this definition with the completely undefined concept of "cost" offered by the Government in this case highlights the glaring deficiencies in the proposed approach.[30]

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29. "... the term 'cost' means the respective seller's cost and not an average cost in the industry whether such average cost be determined by an industry cost survey or some other method. It consists of the total outlay or expenditure by the seller in the acquisition, production, and distribution of the products involved, and comprises all elements of cost such as labor, material, depreciation, taxes (except taxes or net income and such other taxes as are not properly applicable to cost), and general overhead expenses, incurred by the seller in the acquisition, manufacture, processing, preparation for marketing, sale, and delivery of the products. Not to be included are dividends or interest on borrowed or invested capital, or nonoperating losses, such as fire losses and losses from the sale or exchange of capital assets. Operating cost should not be reduced by items of nonoperating income, such as income from investments, and gain on the sale of capital assets." *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R.* 10235, 86th Cong., 2d Sess. 4-5 (1960).

30. Holdings of the Federal Trade Commission in cases arising under Section 5 of the Federal Trade Commission Act, cited in the Government brief (23) have no relevance here. (*E. B. Muller & Co. v. Federal Trade Commission*, 142 F.2d 511 (6th Cir. (1944); *Blackwell Journal Pub. Co.*, 23. F.T.C. 413 (1936); *Lock Joint Pipe Co.*, 27 F.T.C. 709 (1938).) Under its jurisdiction to fill in the meaning of Section 5's prohibition of "unfair methods of competition" the Commission exercises a quasi-legislative discretion which a court in a criminal case cannot exercise. The Commission acts with an expertise comparable to that of regulatory agencies which rule upon issues of reasonable rates in regulated industries, and its orders have only prospective effect.

There are still further difficulties with using "sale below cost" as a test of "unreasonably low prices." Even if there were complete agreement upon whose costs will govern, and what costs should be included, there would remain the complex problems of computing the relevant costs and of allocating indirect and joint costs to particular sales of particular products. The difficulties of making determinations of this kind have been revealed by cost justification proceedings under Section 2(a) of the Act. These difficulties prompted the Court to advert to "the intricacies inherent in the attempt to show costs" in such proceedings and to the "elusiveness of cost data, which apparently cannot be obtained from ordinary business records . . ." *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 68 (1953).

The cost justification proviso of Section 2(a) defines the costs which are relevant to a determination and is therefore more definite than the undefined standard offered here. (See Appendix to this brief.) Further, the proviso operates only after the respondent has committed a prima facie violation and is thus on notice of possible illegality. The proviso operates only in civil, and not in criminal, situations. Even so, it has proved to be extremely difficult to apply. In 1956 the Federal Trade Commission's Advisory Committee on Cost Justification confirmed these difficulties. The Committee directly contradicts the Government's contention here that it is a simple matter for defendants to produce the rele-

vant cost information from their own records.[31] As the Committee stated: "It has not been customary for business enterprises to calculate and record the costs of commodities and distribution services in the detail required for a Robinson-Patman Act determination."[32] The Committee completely rejected any assumption that product costs can be readily determined in accordance with "scientific" cost accounting procedures. It stated:

> "Cost accounting is not and can never become an exact science because of the inherent element of judgment. Despite the prescription of uniform and detailed cost accounting procedures, two equally competent cost accountants may obtain different results from the same data. For this reason all cost accounting and cost analysis results should be accepted as reasonable approaches to accuracy, and not as precise measurements. The fact

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31. Few agencies have had more experience with the relation of costs to prices than the Office of Price Administration in World War II. In 1946, Congress was considering a proposal that prices fixed by OPA should provide for total costs plus a reasonable margin of profit. The Deputy Administrator for Accounting of OPA, Paul M. Green, reported to the Banking and Currency Committee of the House of Representatives that probably 85% of all industrial companies do not allocate cost information on a product basis, and hence could not produce cost information needed to determine prices on a cost basis. Later, this estimate was more than confirmed by a survey of 187,370 companies. EDWARDS, PRICE DISCRIMINATION 592-93, n. 18 (The Brookings Institution, 1959).

32. ADVISORY COMMITTEE ON COST JUSTIFICATION, REPORT TO THE FEDERAL TRADE COMMISSION 10 (1956); CCH, COST JUSTIFICATION REPORT, TEXT OF REPORT TO THE FEDERAL TRADE COMMISSION BY THE ADVISORY COMMITTEE ON COST JUSTIFICATION 14 (no date).

> that unit costs are frequently stated in mathematical terms, after elaborate and painstaking calculations, gives them an aura of precision that is not warranted. With few exceptions, every unit cost and every cost difference is subject to some plus or minus allowance. This fact is universally recognized for managerial purposes and should be for purposes of the Robinson-Patman Act. Most of the difficulties of proof stem from the fact that cost differences at best include elements of opinion and approximation." (ADVISORY COMMITTEE at 6, CCH at 10, *op. cit. supra* n. 32)

These authoritative characterizations of the difficulties of determining the unit costs of particular products are confirmed by Professor Corwin Edwards, former chief economist of the Federal Trade Commission. In his book on price discrimination[33] he points out that individual sellers frequently market a number of commodities, and that when the cost of one of these products comes into question, it becomes necessary to segregate the costs applicable to that product from the costs applicable to the others. This is an extremely difficult thing to do. The problem would arise under the present indictment, which covers a number of different products expressly lumped together under the term "milk," including not only whole milk and cream in their various forms but also "by-products such as cottage cheese

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33. EDWARDS, PRICE DISCRIMINATION 591 (The Brookings Institution, 1959).

and sour cream." (R 2)[34]

Moreover, as Professor Edwards points out, the further difficult problem arises of allocating responsibility for various costs of doing business to particular products. There are, he states, "often several plausible ways in which that responsibility can be determined, each differing from the other in the resulting computation of costs."[35] Further, he discusses the inherent limitations on the ability of sellers to price their products in terms of cost because of uncertainties as to the volume which will be sold, the efficiencies which will be achieved by different production levels and the other inherent obstacles to knowing one's costs in advance.

These demonstrations of the inherent difficulty of using cost as a standard for price in the relatively narrow and defined area of cost justification are all the more pertinent to the totally undefined standard of cost offered by the Government as an absolute test of the legality of prices.

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34. As Walter H. Hamilton said shortly after enactment of the Robinson-Patman Act: "No accountant has been able to devise a method yielding by-product or joint-cost figures which does not embody a dominance of arbitrariness and guesswork." Hamilton, *Cost As A Standard for Price*, 4 LAW AND CONTEMP. PROB. 321, 323 (1937). A well recognized authority in the accounting field suggests four ordinary methods of accounting for by-products, each of which yields a different result and three of which involve attributing no cost at all to the by-products. WIXON, ACCOUNTANT'S HANDBOOK §6-72 (Ronald, 4th ed., 1961). Acceptable methods of attributing costs to joint products include allocation of costs on the basis of (1) relative market *price*, (2) proportionate volume of common material, (3) a survey "whereby common costs are allocated to joint products *arbitrarily* after consideration of a number of important factors. . . ." (*Id.* §6-71, emphasis added)

35. EDWARDS, *op. cit. supra* note 33, 596-97.

The difficulties are borne out by careful analyses of experience under the state sales-below-cost statutes, which led one writer to conclude that "'cost' as a criterion of price in these statutes is largely a fiction,"[36] and another that it is an economic fallacy.[37]

The Government is thus grossly in error when it asserts that determination of whether defendants have sold below cost is "easily within the competence of judge and jury." The same error undermines the opinion in *F & A Ice Cream Co. v. Arden Farms Co.*, 98 F. Supp. 180, 189 (S.D. Cal. 1951) (quoted in G.B. 22). The district judge, whose authorization in the same case of private suits under Section 3 has since been invalidated by this Court's holding in the *Nashville* case,[38] voiced the erronous impression that "cost accountancy has reached the exactness of a science." (*Id.* at 189)

Other efforts of the Government brief to establish secondarily that individual product costs are easy to ascertain are equally unavailing. The mere fact that one defendant has pleaded guilty to an "unreasonably low prices indictment" (G.B. 23) and a few have consented to civil Sherman Act or Federal Trade Commission Act decrees containing provisions on selling below cost or at unreasonably low prices obviously does not prove that these terms possess constitutional certainty. It merely shows that some defendants

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36. Clark, *Statutory Restrictions on Selling Below Cost*, 11 VAND. L. REV. 105, 123 (1957).

37. Lovell, *Sales Below Cost Prohibitions: Private Price Fixing Under State Law*, 57 YALE L. J. 391, 396 (1948).

38. *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F. Supp. 796 (S.D.Cal. 1950).

were willing to settle on such terms for reasons which are unknown, but probably in the face of possibly worse alternatives.

The assertion that the Canadian Restrictive Trade Practice Commission has "displayed no difficulty in assessing evidence of costs" in investigating allegations of unreasonably low prices (G.B. 23, note 8) is completely refuted by examination of the Report cited by the Government, a "Report Concerning the Wholesale Trade in Cigarettes and Confectionery in the Edmonton District" (1958). The Report dealt with investigation of charges that certain grocery wholesalers were selling cigarettes and chocolate at unreasonably low prices. The Report obviously experienced great difficulty because of the varying costs of low-price general line wholesalers as compared with those of higher-priced tobacco and confectionery wholesalers. The Report did not even attempt to ascertain individual product costs, and it stated that "it would not be feasible for wholesale grocers to attempt to determine the cost of distribution for individual items . . ." (*Id.* at 54). The wholesalers being investigated were exonerated as a result of estimates by the Commission as to average costs, togther with conclusions that the low prices were motivated by good business reasons. The Report is an excellent example of why questions of this kind cannot be committed to courts and juries in criminal cases, but must be left to the discretion and judgment of administrative bodies.

The great difficulties involved in using cost as a standard for price are demonstrated by a case cited in the Government brief (p. 10), *Ben Hur Coal Co. v. Wells*, 242 F.2d

481 (10th Cir. 1957). The case was a private suit under Section 3 alleging sales of coal at unreasonably low prices. The plaintiff contended that the defendant had sold below cost, and the defendant contested this. The court reviewed the theories and accounting demonstrations of both sides at some length, and avoided the issue by disposing of the case, not upon a cost basis, but upon a finding that the defendant's pricing policy was based upon good business reasons. The court stated that "in the final analysis, the question resolves itself into one of intent and purpose, not a choice of accounting methods" (*Id.* at 486).

It would seem beyond dispute that a standard of sales below cost should not be adopted for criminal prosecutions without carefully predetermined specific definitions. Otherwise, defendants may be subjected to a completely unconstitutional lack of due process. Accordingly, even if the Government's attempted reconstruction of the unreasonably low prices clause were adopted, the indictment would not rest upon a sound constitutional foundation.

CONCLUSION

It is therefore submitted that the decision of the district court dismissing the Robinson-Patman Act counts of the indictment on constitutional grounds was entirely correct and should be affirmed.

Respectfully submitted,

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APPENDIX

This appendix sets forth the full texts of Sections 1 and 3 of the Robinson-Patman Act (49 Stat. 1526-1528) as they appear in the United States Code (15 U.S.C. §13, 13a).

SECTION 1

Section 1 of the Robinson-Patman Act, known as Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, is as follows:

"§ 13. Discrimination in price, services, or facilities.
(a) Price; selection of customers.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing contained in Sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, how-*

ever, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing contained in said sections shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing contained in said sections shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Burden of rebutting prima-facie case of discrimination.

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Com-

mission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in Sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) **Payment or acceptance of commission, brokerage or other compensation.**

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control of, any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) **Payment for services or facilities for processing or sale.**

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with

the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) **Furnishing services or facilities for processing, handling, etc.**

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) **Knowingly inducing or receiving discriminatory price.**

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. Oct. 15, 1914, c. 323, §2, 38 Stat. 730; June 19, 1936, c. 592, §1, 49 Stat. 1526."

SECTION 3

Section 3 of the Robinson-Patman Act is as follows:

"13a. **Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties.**

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party

to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."